United Nations

AT

Administrative Tribunal

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ADMISTRATIVE TRIBUNAL

Judgement No. 978

Case No. 1086: AFAWUBO

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Hubert Thierry, President; Mr. Mayer Gabay, Vice-President; Ms. Marsha A. Echols;

Whereas, on 8 June 1999, Mensah Novito Afawubo, a staff member of the Office of the United Nations High Commissioner for Refugees (hereinafter referred to as UNHCR), filed an application containing pleas which read as follows:

"10. (a) Pursuant to article 9, paragraph 1 of the Statute of the United Nations Administrative Tribunal (UNAT), and in conformity with article 7 of the UNAT's Rules, I am hereby referring to the Tribunal, for its judgement and ruling, my disagreement with the conclusions reached by the Geneva Joint Appeals Board (JAB) in respect of my appeal to it regarding the failure by UNHCR's Appointments, Promotions and Postings Board (APPB) to recommend me, at its 1995 annual regular and Recourse sessions, for promotion, on the one hand, and for the granting of a Longer Fixed-Term Appointment (LFTA), on the other.

(b) The administrative decisions being contested by me in that respect are those carried by Inter-Office Memorandum/39/95 – Field Office Memorandum/38/95 (IOM/39/95 – FOM/38/95) of 16 June 1995 and Inter-Office Memorandum/77/95 – Field Office Memorandum/79/95 (IOM/77/95 – FOM/79/95) of 6 November 1995,

both signed by the United Nations High Commissioner for Refugees following, respectively, the annual regular session and the Recourse session of the APPB, and both of which I considered invalid with respect to me because they *unjustifiably* denied me the said promotion and a LFTA since the grounds and arguments advanced for such denial were completely invalid, considering that I had fully met the criteria for being promoted and granted a LFTA, as will be demonstrated in detail …, whilst the APPB claimed the contrary.

11. In view of that injustice to me, therefore, I request reparation as follows:

(i) Regularization by promotion to the P-3/L-3 level with retroactive effect from 1995, the year of that injustice;
(ii) Corresponding retroactive adjustments of salary and other financial entitlements, as well as of seniority-in-grade;
(iii) Retroactive regularization of my contractual status as appropriate to my then seniority, not excluding the granting of an Indefinite Appointment, the criteria for which (being in my eleventh year with UNHCR in 1995) I had largely fulfilled, just like my other colleagues who were then granted that appointment for having accomplished more than five years of uninterrupted service;
(iv) Damages for the prejudice caused to my career development by such injustice – the amount of which I leave it up to the Tribunal to fix."

Whereas the Respondent filed his answer on 11 July 2000;

Whereas the Applicant filed written observations on 30 August 2000;

Whereas the facts in the case are as follows.

The Applicant entered the service of UNHCR in Lome, Togo, on 1 June 1984, on a three-month fixed-term appointment as Senior Administrative Assistant at the GL-8 level. He served under a series of short-term contracts until 1 May 1985, when he was granted a fixed-term appointment of one-year. Effective 1 January 1986, his status changed from Local General Service to National Professional Officer and he was promoted to Assistant Administrative Officer. On 16 January 1989, the Applicant was reassigned to Yaounde, Cameroon, as Associate Program Officer with a special post allowance at the P-2 level. On 1 January 1990, he received a one-year intermediate-term appointment at the L-1 level as Associate Protection Officer in Aware, Ethiopia, and on 1 July 1991, his appointment was

extended and he was promoted to the L-2 level. He was subsequently reassigned to Djibouti as Associate Programme Officer on 16 November 1991, and to Conakry, Guinea as Programme Officer on 1 September 1992. Effective 31 December 1993, the Applicant's post was discontinued but nevertheless his contract was extended for two months on 1 January 1994. On 1 March 1994, his title was changed to Associate Officer and on 21 March 1994, he went on mission to Bangui, Central African Republic (CAR). He was officially reassigned to Bangui as Senior Programme Officer with a special post allowance to the L-3 level on 1 August 1994. His status was converted from intermediate fixed-term to long-term for one year effective 1 January 1995.

In a memorandum to the Appointments, Promotions and Postings Board (APPB), UNHCR, dated 3 March 1994, the UNHCR Representative, CAR, recommended that the Applicant be promoted to "at least" the P-3/L-3 level, and be granted an Indefinite or Longer Term appointment, and converted from Project Personnel (L) to the Professional (P) category. Following the annual session of the APPB in March, on 20 June 1995, the High Commissioner circulated a memorandum entitled "1995 Promotions in the Professional, Project Personnel (L) and National Professional Officer Categories and the Granting of Indefinite Appointments in the Professional and National Professional Officer Categories". The Applicant was not included in this list.

In accordance with the recourse procedures of the APPB regulations, the Applicant wrote to the Secretary, APPB, on 28 June 1995, requesting an explanation as to why he had not been promoted, converted to the P category or had his contractual status reviewed. He requested all written information pertaining to the Board's review of his case. On 7 July 1995, the Secretary, APPB, replied enclosing a copy of the documentation submitted to the APPB and explaining that "the Board carefully reviewed [the Applicant's] case … but was unable to retain [his] name because the evaluation of his performance on file did not sufficiently demonstrate [his] ability to discharge effectively responsibilities at the P-3 level". On 14 August 1995, the Applicant wrote to the Secretary, APPB, requesting recourse. He drew attention to his positive evaluations and performance in positions at the P-3, L-3 and P-4 levels,

enclosed his performance evaluation report of 13 March 1995 (in which he was rated as "very good" but which the APPB had not received prior to its regular session) and a Personnel Action Form converting his status from intermediate-term to long-term effective 1 January 1995.

In October 1995, the APPB met to review recourses submitted by staff members following its regular session. On 6 November 1995, the High Commissioner circulated a memorandum entitled "1995 Promotions and Granting of Indefinite Appointments in the Professional Category" which contained his decisions following the recommendations of the APPB at its recourse session. Again, the Applicant was not included in the list. On 10 November 1995, the Secretary, APPB, advised the Applicant that the APPB had reviewed his recourse during its October session but "regretfully concluded that, in the context of APPB Regulation 39, it contained no new elements which would allow [the APPB] to undertake a substantive review of its previous recommendation to the High Commissioner".

On 24 November 1995, the Applicant wrote to the Secretary-General requesting administrative review of the High Commissioner's decision not to promote him or grant him a Longer Fixed-Term Appointment (LFTA).

On 27 November 1995, the Department of Human Resources Management advised the Staff Administrative Support service that "the APPB agreed that the appointments of staff members at the P/L-1 to D-1/L-6 level who have not benefited from the award of an indefinite appointment and have completed five years of uninterrupted service with UNHCR with a contract expiring before July 1996, be administratively extended". Effective 1 January 1996, the Applicant was granted a LFTA for three years.

On 17 January 1996, the Administrative Law Unit advised the Applicant that his request for administrative review had been received on 19 December 1995.

On 27 February 1996, the Applicant lodged an appeal with the Joint Appeals Board (JAB). The JAB submitted its report on 20 November 1998. Its conclusions and recommendations read as follows:

"**Conclusions and Recommendations**

56. ..., the Panel **concludes** first that the Appellant's right to a Longer Fixed-Term Appointment was fully respected. Therefore, the Panel rejects the Appellant's contentions as far as they relate to the LFTA.

57. The Panel, while recognizing the good performance of the Appellant as a staff member, further **concludes** that there are no grounds for sustaining that the process leading to the decision not to promote the Appellant was vitiated by procedural flaws or any improper motivation.

58. Accordingly, the Panel makes **no recommendation** in support of this appeal."

On 1 January 1999, the Applicant's contract was extended for five years, and on 1 January 2000, he received an indefinite appointment.

On 22 March 1999, the Under-Secretary-General for Management transmitted a copy of the JAB report to the Applicant and informed him as follows:

"...

The Secretary-General has examined your case in the light of the Board's report. With regard to your claim concerning the granting of a LFTA, the Secretary-General has taken note of the Board's finding that this part of your appeal is moot as you were granted, effective 1 January 1996, a LFTA for a period of three years. With regard to your claim concerning your non-promotion, the Secretary-General has taken note of the Board's findings that all relevant rules, regulations and due process requirements had been observed in your case, and that there was no evidence in support of your claim that the APPB's recommendation was flawed in that it failed to give consideration to all the facts before it or that the APPB was improperly motivated when it did not recommend you for promotion. The Secretary-General is in agreement with the Board's findings. He has therefore decided to accept the Board's unanimous recommendation and to take no further action on your case.

..."

On 8 June 1999, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Applicant was wrongfully denied promotion to P3/L3 level and a LFTA by the APPB which failed to fairly consider the evidence presented before it on his behalf.

2. The JAB refused and failed to review the evidence in support of the Applicant's claims and improperly upheld the decision of the APPB.

Whereas the Respondent's principal contentions are:

1. The Applicant has no right to promotion but only to consideration for promotion. The Applicant was properly considered for promotion, and his rights were not violated by his non-promotion.

2. The appeal against the decision not to grant the Applicant a LFTA is moot.

The Tribunal, having deliberated from 26 October to 17 November 2000, now pronounces the following judgement:

I. The Applicant, who entered the service of UNHCR in 1984, carried out a number of missions in Cameroon, Ethiopia and the Central African Republic, first under intermediate-term appointments and then, beginning in 1995, under a longer-term appointment. In 1995, his superior at the UNHCR office in Bangui proposed that the APPB should grant the Applicant an indefinite appointment or a longer fixed-term appointment and promote him to the P-3/L-3 level.

The Board did not specify which type of appointment should be granted to the Applicant, but it refused to promote him, explaining its decision by stating that the Applicant's performance evaluation did not sufficiently demonstrate his ability to discharge effectively responsibilities at the P-3 level. The Applicant then challenged what appeared to him to be a refusal to grant him a long-term appointment and the refusal to promote him to the P-3/L-3 level. As the High Commissioner, following the recommendation of the JAB, did not accede

to his request, the Applicant requested the Tribunal to take a decision on the two points mentioned above: (1) the refusal to grant him a long-term appointment and (2) the refusal to promote him.

II. On the first point, the JAB, and subsequently the High Commissioner and the Respondent in the present case, considered that the Applicant's claim was moot. In fact, the Applicant was given a long-term appointment following the session of the APPB, which did not take any decision with regard to the nature of his appointment, but expressed the view that all staff members who had completed five years' service but had not been awarded indefinite appointments should be given three-year contracts. Forty-six UNHCR staff members were in this position, including the Applicant, who, in receiving a three-year appointment, was treated in the same manner as his colleagues who were in the same situation. Moreover, the Applicant's new contract took effect on 1 January 1996, the expiration date of his preceding appointment, so that the Applicant was never deprived of employment. It may therefore be considered that the Applicant's request concerning the refusal to grant him a long-term contract is moot because he received satisfaction at the appropriate time and, in fact, was never refused such an appointment, since the APPB did not take any decisions on individual cases.

III. On the second point, namely, the refusal to promote the Applicant, it may be allowed that the grounds invoked by the APPB, to the effect that a review of the Applicant's performance had not sufficiently demonstrated his ability to discharge effectively responsibilities at the P-3 level, were expressed too succinctly. In this connection, the Tribunal associates itself with the view expressed by the JAB, in a "special remark" appended to its recommendation, that the APPB should provide clearer reasons for its decision. It is understandable that the Applicant, on the basis of his performance evaluations and the length of his service with UNHCR, should have legitimately expected a promotion, and it is true that he was not undeserving of such a promotion.

Nonetheless, these considerations do not permit the Tribunal to deviate from its consistent and often-recalled position, in its case law, that neither length nor quality of service creates an entitlement to an automatic promotion, insofar as the Administration has discretionary power in this area, provided that the applicant himself has not proved the existence of discrimination or motives other than the interests of the service. This is not the case in the present instance (Judgement No. 941, *Kiwanuka* (1999)).

The Tribunal is therefore legally bound to reject the application, despite the insufficient explanation of the reasons for not promoting the Applicant and the sympathy which the Applicant appears to deserve.

IV. For these reasons, the Tribunal rejects the application.

(Signatures)

Hubert THIERRY
President

Mayer GABAY
Vice-President

Marsha A. ECHOLS
Member

New York, 17 November 2000

Maritza STRUYVENBERG
Executive Secretary